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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Implementation of the Local)
Competition Provisions of the)
Telecommunications Act of 1996)
)
Joint Petition of BellSouth, SBC, and Verizon)
for Elimination of Mandatory Unbundling of)
High-Capacity Loops and Dedicated Transport)
)

CC Docket No. 96-98 /

WORLDCOM COMMENTS

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I. Introduction and Summary

Only eighteen months after the adoption of the UNE Remand Order,¹ three RBOCs have petitioned the Commission to find that “high-cap” transport and loops, which the RBOCs define as circuits at a level of DS-1 or higher, e.g., DS-1, DS-3, OC-n, and dark fiber loops and transport, should no longer be subject to mandatory

¹Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, released November 5, 1999 (UNE Remand Order).

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unbundling.² The RBOC petitioners contend that there are now “ample alternatives” for these elements available outside the ILECs’ networks.

The Commission should dismiss the RBOC petition because it is procedurally defective. In the UNE Remand Order, the Commission stated in the clearest possible terms that it would review the national list of unbundled network elements only at three-year intervals, and that it would not consider *ad hoc* petitions to modify the national list.³

If the Commission does reach the merits of the RBOC petition – which it should not – it should affirm the UNE Remand Order’s conclusion that CLECs are impaired without access to unbundled loops and transport, including “high-capacity” transport. The only “evidence” that the RBOCs present to support their claim that there has been a dramatic expansion in the reach of CLEC networks is drawn from USTA’s latest “Fact Report,” which has already been thoroughly discredited by WorldCom, AT&T, and other parties.⁴ Almost without exception, the “facts” in the Fact Report are incorrect: among other things, CLEC fiber networks do not extend to 175,000 commercial office buildings (the true figure is closer to 30,000); CLECs do not have 218,000 local fiber route miles

²Joint Petition filed on behalf of BellSouth Corporation, SBC Communications, Inc., and Verizon Telephone Companies, April 5, 2001, CC Docket No. 96-98 (RBOC Petition).

³UNE Remand Order at ¶¶ 150-151.

⁴See, e.g., AT&T Reply Comments, CC Docket No. 96-98, April 30, 2001, Pfau Declaration at 21-25.

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(at most, they have a few tens of thousands of local fiber route miles); and fixed wireless has not been shown to be a viable alternative to ILEC elements.

The reality is that the scope of CLEC networks has not expanded to any significant degree in the eighteen months since the Commission adopted the UNE Remand Order. CLEC networks still extend to only a small percentage of the buildings with high-capacity customers and a small percentage of the ILEC central offices where there is demand for high-capacity transport. And the extension of CLEC networks to additional customer buildings or ILEC central offices remains “prohibitively expensive and time-consuming.”⁵ In short, CLECs are still impaired without access to ILEC high-capacity loops and transport.

What has changed in the eighteen months since the Commission adopted the UNE Remand Order is that the capital markets have closed to CLECs. Many of the CLECs responsible for the late-1990s fiber network construction cited by the USTA “Fact Report” are now in financial distress or have even declared bankruptcy, and the CLECs that survive are finding it virtually impossible to obtain additional funding.⁶ There is no prospect that CLECs will have sufficient capital to undertake network construction at the pace of the late 1990s, much less reduce their reliance on ILEC high-capacity loops and transport to any significant degree.

⁵UNE Remand Order at ¶ 183.

⁶See, e.g., “When Big is No Longer Beautiful,” The Economist, December 14, 2000 (The “new tightness of the capital markets” is “threatening to squeeze the life out of previously highly rated upstarts.”)

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II. The Commission Should Dismiss the RBOCs' Petition

In the UNE Remand Order, the Commission explicitly found that the establishment of a triennial review process "for reevaluating the unbundling obligations is warranted to provide competitors with reasonable certainty for a period of time that is sufficient time to implement their plans. Revisiting our rules in three years should provide sufficient certainty to the carriers and capital markets and should provide carriers with sufficient time to implement their plans."⁷ The RBOC Petition provides no reason why this finding should be ignored.

On April 25, 2001, NewSouth Communications filed a motion to dismiss the RBOC Petition.⁸ WorldCom strongly supports NewSouth's motion and urges the Commission to dismiss the RBOC Petition and reaffirm its commitment to maintain reasonably stable unbundling rules for the benefit of capital markets and CLEC planning. As NewSouth explains, the RBOC petition is premature and procedurally defective.

The RBOC petition plainly violates the framework established in the UNE Remand Order for revisiting the national list of unbundled network elements only every three years. Remarkably, the RBOC Petition completely ignores this aspect of the UNE Remand Order in their petition. The RBOCs later filed a joint opposition to NewSouth's

⁷ UNE Remand Order, ¶ 151.

⁸ Motion to Dismiss Joint Petition, NewSouth Communications, CC Docket No. 96-98, April 25, 2001.

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motion and argued, in essence, that the Commission either did not or could not adopt a process to review the national list of unbundled network elements only on a triennial basis.⁹ Neither of these arguments can withstand scrutiny.

The UNE Remand Order clearly states that, in the interest of promoting certainty and stability, the Commission would decline to entertain *ad hoc* petitions such as the RBOC petition, and would instead revisit the national list every three years. The RBOCs now appear to acknowledge this, but claim that the Commission did not foreclose the possibility that it might find that particular elements no longer meet the mandatory unbundling standard before the triennial review is undertaken. To support this argument, they rely on the Commission's statement that "it would be . . . very difficult for us to predict, at this time, the date at which incumbent network elements would no longer be subject to unbundling obligations under section 251."¹⁰ This quote, which is taken entirely out of context, in fact explains why the Commission did not adopt a rule mandating that elements will not be subject to unbundling after a future date certain. It in no way suggests that the Commission would welcome any petitions for the removal of individual elements from the national list prior to the next scheduled review.

The RBOCs also argue that the Commission could not, consistent with the Act, establish a process in which the list of unbundled elements would be reviewed only

⁹Opposition of BellSouth Corporation, SBC Communications, Inc., and the Verizon Telephone Companies, CC Docket No. 96-98, May 7, 2001.

¹⁰RBOC Opposition at 3 (citing UNE Remand Order at ¶ 152).

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every three years. According to the RBOCs, compelling continued access to elements for which requesting carriers may no longer be impaired would violate the section 251(d)(2) standard. But if this were true, then the Commission would have no choice but to consider any petition alleging that competitors would not be impaired without access to a particular element in a particular place. This is absurd. Section 251(d)(2) does not require the Commission to assess impairment whenever a party suggests a change in facts. The Commission has reasonably interpreted the Act to allow periodic review of the unbundling list and not to require the consideration of *ad hoc* petitions. If the RBOCs disagreed with this interpretation, they should have sought reconsideration or review. They cannot collaterally attack it here.

The three-year review rule is fully consistent with Section 251(d)(2). In the UNE Remand Order, the Commission concluded that, in addition to the "impair" standard, the "consider, at a minimum" language of Section 251(d)(2) allows the Commission to consider other factors that are consistent with the Act in making its unbundling determination.¹¹ Regardless of whether the three-year review rule could require, in certain instances, the unbundling of an element that does not meet the impairment standard, the three-year review rule is consistent with Section 251(d)(2) because it furthers the goals of administrative practicality and certainty in the market.¹² As the Commission found in the UNE Remand Order, if Congress had intended to require the

¹¹UNE Remand Order at ¶ 101.

¹²UNE Remand Order at ¶¶ 114-116, 150.

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incumbent LECs to unbundle an element only when it met the impair standard, Congress would not have used the discretionary phrase "consider at a minimum."¹³

III. CLECs Are Still Impaired Without Access To High Cap Loops

A. CLEC High Cap Loops Are Not Ubiquitous

The RBOC claim that CLEC “high-cap” loops are now ubiquitously available rests on “evidence” – the USTA Fact Report’s claim that CLEC fiber serves 175,000 buildings – that has already been thoroughly discredited.¹⁴ Most independent observers have reported that CLEC fiber actually connects to only 3 to 5 percent of the nation’s commercial office buildings, or about 30,000 buildings.¹⁵

As is shown in WorldCom’s analysis of the USTA Fact Report (Attachment A), the 175,000 building figure claimed by the Fact Report is inflated because it (1) double-counts buildings that are served by multiple CLECs; (2) includes “off-net” buildings that CLECs serve using ILEC facilities; and (3) includes buildings in other countries.¹⁶ The attached Declaration of Jay Slocum (Slocum Declaration) explains, for example, that

¹³UNE Remand Order at ¶ 102.

¹⁴See, e.g., AT&T Reply Comments, CC Docket No. 96-98, April 30, 2001, Pfau Declaration at 21-25; WorldCom Reply Comments, CC Docket No. 96-98, April 30, 2001, Attachment at 6-7 (provided with these comments as Attachment A); Sprint Reply Comments, CC Docket No. 96-98, April 30, 2001, at 4.

¹⁵See, e.g., “CityNet Wins \$275 million in Funding,” Washington Post, April 10, 2001, p. E5.

¹⁶Attachment A at 6-7.

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WorldCom serves about [proprietary begin ***** proprietary end] domestic buildings over its own facilities,¹⁷ not the 40,000 buildings attributed to WorldCom by the USTA Fact Report.¹⁸

By no stretch of the imagination can it be said that the 30,000 or so “on-net” buildings are sufficient to provide CLECs with “ubiquitous” supply of high-capacity loops. While the buildings that are served by CLEC fiber tend to be higher-demand buildings, the number of on-net buildings is so small that on-net buildings still represent only a small percentage of the total demand for high-capacity circuits, and represent an lower percentage of “high cap” customer locations. WorldCom, which has perhaps the most extensive local network of any CLEC, self-supplies loops for only [proprietary begin ***** proprietary end] percent of its DS-1 and DS-3 circuits.¹⁹ Given that WorldCom has a large, geographically-diversified customer base, WorldCom’s experience provides a good measure of the reach of CLEC networks – and shows that their reach is far from ubiquitous.

¹⁷Declaration of Jay Slocum (Attachment B) at ¶ 5..

¹⁸The 175,000 building figure cited by the USTA Fact Report is derived from data in “CLEC Report 2001: 13th Edition” (Table 10), a report prepared by the market research firm New Paradigm Resources Group, which shows WorldCom as serving 40,000 buildings.

¹⁹Attachment B (Slocum Declaration) at ¶ 6.

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B. Factors Of Cost And Timeliness Still Impair CLECs

Because existing CLEC and fiber wholesaler network facilities still reach only a fraction of the “high-cap” customer base, CLECs are still impaired without access to high-capacity loops. As the Commission found in the UNE Remand Order, requiring CLECs to build loop plant to the many high-capacity customer buildings that are not already served by CLEC networks would “materially raise entry costs, delay broad-based entry, and limit the scope and quality of the competitor’s offerings.”²⁰

Contrary to the ILECs’ claim, there is no marketplace evidence that CLECs are able to “quickly and cost-effectively” construct loop facilities wherever there is demand for high-capacity circuits. To the contrary, the marketplace evidence confirms that the construction of high-cap loops is costly and time consuming: after all, CLECs have been able to extend their fiber to only a small percentage of high-capacity customer locations, despite multibillion dollar investments over the past fifteen years.

Moreover, the marketplace evidence shows that CLECs have been able to extend their networks only to high-density buildings in central business districts, such as carrier hotels, Internet Service Provider Points of Presence (ISP POPs), and very large office buildings, where there is often demand for several DS-3s or even multiple OC-n circuits. Because the vast majority of buildings with “high cap” customers are lower-density buildings that require only a handful of DS-1s or, at most, a single DS-3,²¹ the fact that

²⁰UNE Remand Order at ¶¶181, 184.

²¹Data provided by U S West with its 1998 forbearance petition for Phoenix showed that, of the 3101 end user locations in the Phoenix Metropolitan Statistical Area

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CLECs may have “successfully self-provisioned” loops to carrier hotels and very large office buildings is not an indicator that self-supply of high-capacity loops is viable as a general matter.²²

As the Commission found in the UNE Remand Order, a CLEC’s ability to self-supply loops is, as a general matter, limited by the very high fixed and sunk costs of constructing loop facilities.²³ The ILEC claim that these costs are “manageable” for high-capacity loops is refuted by the Declaration of Edwin A. Fleming (Fleming Declaration) attached to these comments.²⁴ Mr. Fleming’s Declaration shows that the cost of recent WorldCom “building adds” has averaged \$250,000, thus confirming the UNE Remand Order’s finding that “[b]uilding out any loop is expensive and time consuming, regardless of its capacity.”²⁵ And the cost of extending fiber to a building is even greater when the target building is more than a mile from WorldCom’s existing network; in these cases, WorldCom adds the building to its network only as part of the

(MSA) with “high speed” service (DS1 and above), over half – or 1634 locations – were served by only a single DS1 (and no DS3 or higher services). Over 90 percent of locations in the Phoenix MSA – 2815 – obtained fewer than 10 DS1s and no DS3 or higher services. Petition of U S West Communications, Inc. for Forbearance from Dominant Carrier Regulation in the Phoenix, Arizona MSA, CC Docket No. 98-157, August 24, 1998, Attachment B, Appendix D

²²A CLEC’s ability to self-provide loops to carrier hotels and other high-density locations in central business districts “suggests . . . only that carriers are unimpaired in their ability to serve those particular customers.” UNE Remand Order at ¶ 184.

²³UNE Remand Order at ¶¶ 182-185.

²⁴Attachment C (Fleming Declaration).

²⁵UNE Remand Order at ¶ 184.

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construction of a new subnetwork, i.e., a new ring, which is typically a multi-million dollar project.²⁶

Because of the high fixed and sunk costs of loop construction, it is generally not economical for a CLEC to self-supply loops to a typical building (whose total demand might only be a DS-3 or less). As is explained in the Fleming Declaration, if projected WorldCom customer demand in a building is a DS-3 or less, the building is usually not even considered for a “building add.”²⁷ For such typical buildings, a CLEC’s per-DS-1 cost of self-provisioning would be very high because the CLEC might win only a portion of the building’s demand and would incur costs of \$250,000 or more even in those cases where the CLEC had an existing ring nearby (and substantially more in those cases where the CLEC had to build a new fiber ring.) By contrast, the cost of obtaining an unbundled DS-1 loop from the ILEC is between \$60 and \$100 per month. Under the UNE Remand Order’s impairment standard, such a “material difference” between the cost of self-provisioning and the forward-looking cost of the element demonstrates that self-provisioning is not a “practical and economical alternative” to the incumbent LEC’s unbundled network elements for typical buildings.²⁸

The differential between CLEC costs and the forward-looking cost of the ILEC element reflects the economies of scale disadvantages faced by CLECs. As is explained in the attached Declaration of A. Daniel Kelley and Richard A. Chandler

²⁶Attachment C (Fleming Declaration) at ¶ 8.

²⁷Attachment C (Fleming Declaration) at ¶ 10.

²⁸UNE Remand Order at ¶¶ 73-74.

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(Kelley/Chandler Declaration),²⁹ economies of scale in local networks suggest that for the foreseeable future the ILECs will be the sole supplier of both low- and high-capacity services in many geographic areas, including geographic areas that contain high-capacity customer locations.³⁰ Because CLECs enjoy fewer economies of scale, Kelley and Chandler conclude that “even in the most competitive market in the country, a significant number of customers do not have either current or realistic potential alternatives to the ILEC.”³¹ In particular, “construction of competitive CLEC facilities in less dense geographic portions of cities is not viable.”³² And if there is demand for only a small number of voice grade or T1 lines in a given building, or if the building is located too far from the CLEC fiber ring, it may not be economical to build the facilities to serve customers in that building at all.³³

Even if there were no cost differential, investment and construction of high-capacity loop facilities “would likely delay, if not prohibit, market entry and postpone, perhaps indefinitely, the benefits of telephone competition for consumers.”³⁴ First, the number of building adds that can be undertaken by a CLEC is limited by available

²⁹ Attachment D.

³⁰ Attachment D (Kelley/Chandler Declaration) at ¶ 24.

³¹ Attachment D (Kelley/Chandler Declaration) at ¶ 33.

³² Attachment D (Kelley/Chandler Declaration) at ¶ 24.

³³ Attachment D (Kelley/Chandler Declaration) at ¶ 33, 35 (“[I]t is obvious that a CLEC will not even consider expanding its network to a building unless many multiples of DS-1s can be served.”).

³⁴ UNE Remand Order at ¶ 182.

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capital and engineering resources. As numerous parties have pointed out, the pace of CLEC fiber network expansion has slowed markedly over the past year as the capital markets have closed to CLECs.³⁵

Second, as is explained in the Fleming Declaration, the “building add” process typically takes between six and nine months, and can take significantly longer if, as is often the case, the CLEC encounters roadblocks when negotiating rights-of-way and building access agreements.³⁶ In many cases, delays of six to nine months make it impossible for the CLEC to compete for a customer; despite recent declines in ILEC provisioning performance, ARMIS data shows that the ILECs’ ubiquitous networks still permit ILECs to provision high-capacity special access circuits in less than 20 days.³⁷

C. Fixed Wireless Does Not Provide a Viable Alternative to ILEC Elements

In their petition, the RBOCs claim that fixed wireless “is a legitimate alternative to fiber.”³⁸ This claim is, as a practical matter, false. The two CLECs whose business plans relied most heavily on fixed wireless – Winstar and Teligent – have filed bankruptcy petitions and, even before they filed for bankruptcy, found it necessary to use

³⁵See, e.g., AT&T Reply Comments, CC Docket No. 96-98, April 30, 2001, at 12-15.

³⁶Attachment C (Fleming Declaration) at ¶ 9.

³⁷See ARMIS 43-05 summary results, <http://www.fcc.gov/ccb/armis/sq/documents/10.pdf>

³⁸RBOC Petition at 15.

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wireline facilities leased from the ILECs to serve many of their customers.³⁹ While Winstar and Teligent's failures do not prove that fixed wireless could never substitute for fiber, they refute any claim that fixed wireless is able to provide a widespread substitute for fiber at this time.

The RBOC Petition also cites WorldCom's fixed wireless holdings as evidence of the substitutability of fixed wireless for fiber. In fact, WorldCom's MMDS offerings do not provide a substitute for DS-1 (or higher-capacity) circuits. WorldCom's MMDS service is IP-based and does not provide a constant bit-rate T1-replacement service. Most importantly, WorldCom's MMDS service cannot provide symmetrical bandwidth equivalent to a DS-1. The maximum upstream bandwidth is 512 kbps. Accordingly, the RBOC Petition's reliance on WorldCom's fixed wireless offerings is completely misplaced.

IV. CLECs Are Still Impaired Without Access To Unbundled High Cap Transport

A. CLEC And Fiber Wholesaler Networks Are Not Ubiquitous

Contrary to the ILECs' claim, alternative sources of transport supply are not "ubiquitous." As was the case when the Commission adopted the UNE Remand Order,

³⁹Teligent SEC Form 10-K, March 30, 2001 ("In contrast to our wireless customers, we provide services to our wireline customers by leasing high capacity communications lines from other carriers that can provide such facilities between our customer buildings and Teligent owned and operated equipment.")

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alternative supply is available only on “selected point-to-point routes in dense markets.”⁴⁰ Alternative transport is still available to only a small percentage – less than 15 percent – of RBOC wire centers.⁴¹ And many wire centers with CLEC transport have only a single CLEC alternative,⁴² can be reached using CLEC transport only by using less-efficient routing,⁴³ or can be reached using CLEC transport only if the requesting carrier incurs the additional cost of coordinating multiple vendors.⁴⁴

The small number of routes with competitive transport are not sufficient to meet CLECs’ interoffice transport needs. As is shown in Attachment F, fully 71.3 percent of Ameritech’s interoffice revenues are associated with central offices in pricing Zones 3, 4

⁴⁰UNE Remand Order at ¶ 366.

⁴¹Attachment E. Attachment E uses data from the recent RBOC pricing flexibility petitions to show that the central offices specified in these petitions as having competitive transport represent only 11.6 percent of the RBOCs’ central offices. While this figure does not reflect any RBOC central offices with competitive transport that are located in areas not covered by the RBOC pricing flexibility petitions, it is unlikely that there are many such offices. Moreover, the 11.6 percent figure does not include the former GTE territory; inclusion of the GTE central offices would almost certainly push the overall figure well below 10 percent.

⁴²Data provided with BellSouth’s recent special access pricing flexibility petition showed that, in the cities where BellSouth sought pricing flexibility, 100 of the 237 wire centers with CLEC transport had only a single CLEC alternative. Only 93 of the 237 wire centers with CLEC transport had three or more CLEC alternatives. BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, August 24, 2000, CCB/CPD File No. 00-20, Attachment 3.

⁴³UNE Remand Order at ¶ 343. If third-party suppliers serve only office A, but a CLEC requires transport to offices A and B, the transport mileage may be lower if the CLEC obtains ILEC transport to office A and then from A to B, rather than separately obtaining CLEC transport to office A and ILEC transport to office B.

⁴⁴UNE Remand Order at ¶ 358, See also ITC^DeltaCom Reply Comments, CC Docket No. 96-98, April 30, 2001, at 4-5.

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and 5 – where CLECs have built transport to only 41 of 1073 central offices (3.8 percent). Even in Zones 1 and 2, CLECs have built transport to only 29 of 69 offices (42.0 percent) – and, in any event, these pricing zones represent only 28.4 percent of Ameritech’s interoffice revenues.

Certainly, there is no basis for the ILECs’ claim that a CLEC can obtain the transport it needs through self-supply or from a single supplier. As is discussed in the Slocum Declaration, WorldCom’s experience shows that even the largest self-providers of transport must rely on ILEC transport for most interoffice routes. Although WorldCom has one of the most extensive local networks of any CLEC, WorldCom can self-provide transport to only **[proprietary begin ***** proprietary end]** of the approximately 6800 RBOC wire centers where WorldCom is currently providing DS-1 or DS-3 circuits to its customers.⁴⁵

ILEC pricing of special access services confirms that CLEC alternatives are limited in scope. As is shown in Attachment G, the large differentials between the ILECs’ special access rates and unbundled transport prices, which the Commission noted in the UNE Remand Order,⁴⁶ continue to exist. Attachment G shows that ILEC special access rates are generally over 200 percent higher than the unbundled transport price for a 10-mile DS-1 circuit. For DS-3 circuits, special access rates are between 17 percent and 128 percent higher than the unbundled transport price for a 10-mile circuit,

⁴⁵Attachment B (Slocum Declaration) at ¶ 8. These figures include the territory served by the former GTE companies.

⁴⁶UNE Remand Order at ¶ 341 n.673.

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depending on the ILEC. These comparisons assume that the CLEC is able to commit to 60-month term plans for access services; the differential between unbundled element and access pricing for shorter terms is even greater.

The recent decline in ILEC provisioning performance for special access circuits provides further evidence that CLEC alternatives are limited in scope. Because competitive alternatives remain few and far between, and there is thus no incentive for ILECs to maintain service quality for special access and dedicated transport services, installation intervals for ILEC special access and dedicated transport circuits have grown longer and longer, and the frequency with which the ILECs miss promised installation dates has increased dramatically.⁴⁷ The New York Public Service Commission recently noted Verizon's "inability to provide its customers and competitors with firm commitments for provisioning and timely installation," and observed that "Verizon continues to be the dominant carrier for Special Services" in New York.⁴⁸

Nothing in the "Fact Report" substantiates the ILECs' claim that the limited sources of alternative supply are sufficient to meet CLECs' requirements for high-capacity transport. First, contrary to the Fact Report's suggestion, the revenue figures

⁴⁷See, e.g., AT&T Comments, CC Docket No. 00-229, January 8, 2001, at 5-8; WorldCom Comments, CC Docket No. 00-229, January 8, 2001, at 1-2.

⁴⁸Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., Order Instituting Proceeding, New York Public Service Commission, Case 00-C-2051, issued November 24, 2000, at 2. The New York Commission subsequently voted to strengthen service quality standards for Verizon New York. See New York Public Service Commission press release, "PSC Strengthens Verizon's Service Quality Standards for 'Special Services'," issued May 23, 2001.

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generated by the Commission's pricing flexibility test do not provide evidence that 65 percent or more of ILEC interoffice transport revenues are addressable by CLECs. The revenue figures generated by the pricing flexibility test are calculated using a special formula that does not measure addressable revenues and, in fact, always produces a revenue figure that is greater than the addressable revenue.⁴⁹

The revenue figures generated by the pricing flexibility tests have other shortcomings. For example, these revenue figures aggregate the revenues for routes that have multiple CLEC alternatives with the revenues for routes that have only a single CLEC alternative. In the UNE Remand Order, the Commission expressly declined to “trigger[] elimination of an incumbent LEC’s unbundling obligation based on the presence of a single competitor” in a particular MSA.⁵⁰ And the revenue figures generated by the pricing flexibility test reflect CLEC transport facilities in the aggregate, not the transport facilities of individual CLECs. The pricing flexibility data thus cannot be used to substantiate the RBOCs’ claim that CLECs can obtain all of their transport needs in an MSA from a single third-party supplier. Finally, the revenue figures generated by the pricing flexibility test — or any aggregate revenue measure — do not allow the Commission to determine the level of alternative supply for each of the various

⁴⁹Revenue figures used in the pricing flexibility determinations are computed using the Section 69.725(c) revenue allocation rule. That rule gives an ILEC “credit” for one-half of the revenues associated with an interoffice transport route as long as a CLEC has constructed transport to one of the offices on that route, i.e., even when there is no competitive supply for the route itself. Consequently, the revenue figure used for pricing flexibility proceedings is always greater than the addressable revenue.

⁵⁰UNE Remand Order at ¶ 344.

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elements that the ILECs have swept into their self-created “high-cap” category (DS-1, DS-3, OC-n, and dark fiber), e.g., to determine whether there are fewer alternatives for DS-1 circuits than for OC-n circuits.

The other “evidence” cited by the “Fact Report” is equally unreliable. As is shown in Attachment A, the USTA Fact Report’s census of competitive fiber networks and route mile data are both inaccurate.⁵¹ CLECs have deployed no more than a few tens of thousands of local fiber route miles, far less than the 218,000 fiber route miles claimed by the ILECs. The Fact Report’s 218,000 mile figure is inflated by double-counting and by the inclusion of long-haul fiber.⁵²

B. Factors of Cost and Timeliness Still Impair CLECs

Because existing CLEC and fiber wholesaler network facilities still reach only a small percentage of the wire centers with demand for high-cap circuits, CLECs are still impaired without access to high-capacity transport. As the Commission found in the UNE Remand Order, requiring CLECs to self-provide transport or acquire transport from third parties “materially increases the costs of market entry or of expanding service, delays broad-based entry, and limits the scope and quality of the competitor’s service offerings.”⁵³

⁵¹ Attachment A at 3-6.

⁵² Attachment A at 4-6.

⁵³ UNE Remand Order at ¶ 332.

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Contrary to the ILECs' claim, there is no marketplace evidence that CLECs can deploy transport facilities "quickly and cost-effectively" to any central office where high-capacity transport is required. To date, CLECs have generally built their own transport only to the largest central offices in urban areas.⁵⁴ There is no evidence that CLECs can, as a general matter, viably build their own transport facilities to more typical central offices that have lower levels of demand or are located further from the central business district.

As the Commission found in the UNE Remand Order, a CLEC's ability to self-supply transport is, as a general matter, limited by the very high fixed and sunk costs associated with the construction of transport facilities.⁵⁵ The Fleming Declaration confirms the UNE Remand Order's conclusion that the cost of building out interoffice transport is "prohibitively expensive."⁵⁶ As Fleming explains, the extension of WorldCom's local network to an additional ILEC central office generally costs at least \$1 million, even when the target central office is close to WorldCom's existing network, and costs substantially more if the target central office is located several miles from WorldCom's existing network, as is typically the case.⁵⁷ In Seattle, for example, Fleming estimates that the extension of WorldCom's local network to the two largest

⁵⁴See, e.g., Attachment F (Zone 1 and Zone 2 offices in Ameritech territory were far more likely to have competitive transport than Zone 3, 4, and 5 offices).

⁵⁵UNE Remand Order at ¶¶ 76, 355-360.

⁵⁶UNE Remand Order at ¶ 355.

⁵⁷Attachment C (Fleming Declaration) at ¶¶ 13-14.

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“off-net” ILEC central offices would require 7.5 miles and 7.0 miles of outside plant construction.⁵⁸

Because the fixed and sunk costs of extending a CLEC network to an additional ILEC central office are so high, it is generally not viable for CLECs to self-supply transport unless the route is relatively short and the traffic density relatively high. For a more typical route, a CLEC’s per-circuit cost of self-provisioning transport would be very high because the CLEC would incur costs of well over \$1 million and could reasonably expect to only win a portion of the demand on that route. By contrast, the cost of obtaining DS-1 transport from the ILEC at forward-looking cost can be as low as \$40 per month for a 5-mile circuit.⁵⁹ As is the case with loops, the differential between CLEC costs and the forward-looking cost of the ILEC element reflects the economies of scale disadvantages faced by CLECs.⁶⁰ Under the UNE Remand Order’s impairment standard, such a “material difference” in cost demonstrates that self-provisioning is not a “practical and economical alternative” to the incumbent LEC’s unbundled network elements for most interoffice transport routes.

Even if there were no cost differential, “replicating the incumbent’s vast and ubiquitous transport network would be prohibitively expensive, and delay competitive entry.”⁶¹ There is no merit to the RBOCs’ claim that CLECs need only construct

⁵⁸Attachment C (Fleming Declaration) at ¶ 14.

⁵⁹See Attachment G.

⁶⁰Attachment D (Kelley/Chandler Declaration) at ¶¶ 25-28.

⁶¹UNE Remand Order at ¶ 355.

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transport to a small number of offices. Not only could a CLEC potentially seek to offer high-capacity service to a customer anywhere in the nation, but, as discussed above, WorldCom currently has “high capacity” customers in over 6,800 RBOC wire centers, the vast majority of which are not served by CLEC transport.

Without access to unbundled transport, WorldCom and other CLECs would have to purchase interoffice transport circuits from the ILECs’ special access tariffs in order to “fill out” their networks. But, as is shown in Attachment G, the differential between ILEC special access rates and forward-looking cost can be over 100 percent for a 10-mile DS-3 circuit and over 200 percent for a 10-mile DS-1 circuit — precisely the types of circuits that CLECs are likely to need on transport routes that are too long or have too little traffic density for self-provisioning of transport facilities to be viable.

V. Unbundling Does Not Deter Investment in High-Capacity Facilities

The RBOCs argue that the Commission should limit the availability of high-cap loops and transport because, they claim, the UNE Remand Order’s unbundling rules deter investment and innovation. As an initial matter, the absurdity of the RBOCs’ argument is highlighted by the inconsistency between the RBOC claim that unbundling deters investment and the basic premise of the RBOC petition, which is that alternative loop and transport facilities have “proliferated dramatically” during the eighteen months since the UNE Remand Order’s unbundling rules were adopted.⁶²

⁶²RBOC Petition at 3.

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More importantly, the Commission has already rejected the argument that unbundling deters investment, finding instead in the UNE Remand Order that the availability of unbundled elements actually promotes investment by “allow[ing] [CLECs] to acquire sufficient customers and the necessary market information to justify the construction of new facilities.”⁶³ In particular, the Commission found that “allegations of competitive harms resulting from a uniform transport unbundling obligation are overstated” because “there are significant operational and technical incentives for a requesting carrier to eliminate its reliance upon transport provided by the incumbent LEC over the long term.”⁶⁴

Contrary to the RBOCs’ claim, the UNE Remand Order’s decision to withhold access to packet switching is not relevant to high-capacity loops and transport. Whatever the merits of that decision – and WorldCom continues to believe that that decision is legally indefensible – the factors underlying the Commission’s decision not to unbundle packet switching do not apply to high-cap loops and transport. The Commission’s decision to withhold access to packet switching was driven by concerns about the impact of an unbundling requirement on the ILECs’ incentives to deploy a “nascent” technology.⁶⁵ The Commission had no such concerns about high-capacity loop and transport facilities at the time of the UNE Remand Order, and there would be no basis for reaching a different conclusion now. High-capacity loops and transport rely

⁶³UNE Remand Order at ¶ 112.

⁶⁴UNE Remand Order at ¶ 368.

⁶⁵UNE Remand Order at ¶ 306, 314.